Chan Chee Chiu & Anor v Director General of Insolvency & Anor

HIGH COURT (KUALA LUMPUR) — POST-BANKRUPTCY NO WA-29PB-359–03 OF 2024
SAHERAN SUHENDRAN JC
9 JANUARY 2025

Bankruptcy — Discharge — Notice of intention by Director General of Insolvency ('DGI') to issue a certificate of discharge — Objection by judgment creditor ('JC') — Whether judgment debtor ('JD') unable to contribute JD's estate — Whether bankruptcy spent — Whether there were more assets to estate of JD in form of dividends — Whether DGI could administer residual assets for benefit of creditors — Whether decision of DGI to discharge JD was justified

The judgment debtor ('JD') was declared bankrupt and the administration of JD's bankruptcy and the JD's estate was managed by the Director General of Insolvency ('the DGI'). In compliance with s 33B of the Insolvency Act 1967 ('IA'), the DGI issued a notice to all creditors including the JC notifying the JC that the DGI intended to issue a certificate of discharge under s 33A of the IA, discharging the JD from bankruptcy. The judgment creditor ('JC'), however, issued a notice of objection contesting the DGI's decision to discharge the JD and filed encl 1 under s 33B(4) of the IA. The deputy registrar ('registrar') allowed encl 1 and ordered the issuance of any certificate of discharge of the JD's bankruptcy by the DGI be suspended for a period of two years. Hence, the JD filed the present appeal. The issue that arose for determination were: (a) whether there were no assets in the estate of the JD for the DGI to administer and the bankruptcy would be spent, rendering the discharge of the JD to be justified; and (b) whether there would be more assets to the estate of the JD in the form of dividends for the DGI to administer rendering the discharge of the JD to be unjustified as the bankruptcy was not spent.

Held, dismissing the appeal:

(1) This was not a case where the JD was unable to contribute to the JD estate, as would be the case where there were no assets in estate. In such cases, the bankruptcy would be spent and its maintenance would serve no purpose other than to burden the Government. In those circumstances, the DG1 would be justified in discharging a bankrupt. On the facts of this case, the DGI confirmed that creditors were owed at the least, a total of RM16,252,596.95; the balance of the assets in the JD's estate was RM500,409.19. There would be more assets in the form of dividends from the estate that would be received by the DGI which would be

administered for the benefit of the creditors. The DGI had more administration to carry out. The bankruptcy was not spent. If the appeal was allowed and the suspension was lifted, then the anticipated future dividends from the estate would be paid to the JD directly and he would be free to use those assets as he thinks fit. This would be at the expense and to the detriment of the creditors (see paras 41 & 44–45).

(2) In an insolvent administration, the estate, whether of an individual or a corporation ought to be fully distributed to the creditors before being returned to the insolvent. This was because given the insolvency of the JD, these assets, in substance, belong 'beneficially' to the creditors. Thus, it was only proper for the creditors that the discharge of the JD was to be suspended for another two years under s 33B(4) of the IA to allow more funds to be paid to the JD estate thus, increasing the returns to creditors (see paras 50–51).

(3) Although the debts were large and amount to RM16,252,596.95 whilst the balance left in the JD estate was merely RM500,409.19, it was more detrimental to the JC and the creditors than to the JD if the JD were unconditionally discharged. The court would be slow to interfere with the DGI's discretion unless there was clear evidence of abuse. In this case, to allow the bankrupt to have free use of the assets of the JD estate when there were unpaid creditors was such an abuse (see paras 53, 55 & 65–66).

[Bahasa Malaysia summary

Penghutang penghakiman ('JD') telah diisytiharkan bankrap dan pentadbiran kebankrapan JD dan harta pusaka JD diuruskan oleh Ketua Pengarah Insolvensi ('DGI'). Dalam mematuhi s 33B Akta Insolvensi 1967 ('AI'), DGI mengeluarkan notis kepada semua pemiutang termasuk JC memaklumkan JC bahawa DGI berhasrat untuk mengeluarkan sijil pelepasan di bawah s 33A IA, melepaskan JD daripada kebankrapan. Pemiutang penghakiman ('JC'), bagaimanapun, mengeluarkan notis bantahan yang membantah keputusan DGI untuk melepaskan JD dan memfailkan lampiran 1 di bawah s 33B(4) AI'. Timbalan pendaftar ('pendaftar') membenarkan lampiran 1 dan memerintahkan pengeluaran sebarang perakuan pelepasan kebankrapan JD oleh DGI digantung selama tempoh dua tahun. Oleh itu, JD memfailkan rayuan semasa. Isu yang timbul untuk diputuskan adalah: (a) sama ada tiada aset dalam harta pusaka JD untuk ditadbir oleh DGI dan kebankrapan akan digunakan, menjadikan pelepasan JD itu wajar; dan (b) sama ada terdapat lebih banyak aset kepada harta pusaka JD dalam bentuk dividen untuk ditadbir DGI menjadikan pelepasan JD tidak wajar kerana kebankrapan tidak digunakan.

Diputuskan, menolak rayuan:

(1) Ini bukan kes di mana JD tidak dapat menyumbang kepada harta pusaka JD, seperti juga kes di mana tiada aset dalam harta pusaka. Dalam kes sedemikian, kebankrapan itu akan digunakan dan pemuliharaannya tidak akan memberi sebarang tujuan selain membebankan Kerajaan. Dalam keadaan tersebut, DG1 adalah wajar untuk melepaskan seorang bankrap. Mengenai fakta kes ini, DGI mengesahkan bahawa pemiutang mempunyai hutang sekurang-kurangnya, sejumlah RM16,252,596.95; baki aset dalam ladang JD adalah RM500,409.19. Iany akan ada lebih banyak aset dalam bentuk dividen daripada harta pusaka yang akan diterima oleh DGI yang akan ditadbir untuk faedah pemiutang. DGI mempunyai lebih banyak pentadbiran untuk dijalankan. Kebankrapan tidak digunakan. Jika rayuan dibenarkan dan penggantungan itu ditarik balik, maka jangkaan dividen masa depan daripada harta pusaka akan dibayar kepada JD secara terus dan dia akan bebas menggunakan aset tersebut sebagaimana yang difikirkannya patut. Ini akan memudaratkan dan merugikan pemiutang (lihat perenggan 41 & 44–45).

(2) Dalam pentadbiran tidak solven, harta pusaka, sama ada individu atau perbadanan hendaklah diagihkan sepenuhnya kepada pemiutang sebelum dikembalikan kepada insolven. Ini kerana memandangkan ketakmampuan JD, aset ini, pada hakikatnya, adalah 'bermanfaat' kepada pemiutang. Oleh itu, ia adalah wajar bagi pemiutang bahawa pelepasan JD akan digantung selama dua tahun lagi di bawah s 33B(4) AI' untuk membenarkan lebih banyak dana dibayar kepada estet JD dengan itu, meningkatkan pulangan kepada pemiutang (lihat perenggan 50–51).

(3) Walaupun hutang adalah besar dan berjumlah RM16,252,596.95 manakala baki yang tinggal di ladang JD hanyalah RM500,409.19, ia lebih merugikan JC dan pemiutang berbanding JD jika JD dilepaskan tanpa syarat. Mahkamah akan lambat untuk mengganggu budi bicara DGI melainkan terdapat keterangan penyalahgunaan yang jelas. Dalam kes ini, untuk membenarkan bankrap menggunakan aset harta pusaka JD secara percuma apabila terdapat pemiutang yang tidak dibayar adalah satu penyalahgunaan (lihat perenggan 53, 55 & 65–66).]

Cases referred to

Asia Commercial Finance (M) Berhad v Bassanio Teo Yang [2009] MLJU 313, HC (refd)

Benny Ong Swee Siang, ex parte United Overseas Bank (M) Bhd (formerly known as United Overseas Finance (M) Bhd), Re [2016] 8 MLJ 805; [2016] 3 CLJ 1001, HC (refd)

Chin Su Hin, Ber; ex parte Linggi Agriculture Sdn Bhd [2023] MLJU 2646, HC (refd)

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17; [1997] 2 CLJ 248, CA (refd)

Jeuro Developments Sdn Bhd v Badan Pengurusan Bersama Kondominium Lagenda, Applicant [2017] MLJU 2396, HC (refd)
Lim Chai Oi, Ber v Ex-Parte: Affin Bank Berhad [2019] MLJU 1639; [2020] 1 CLJ 518, HC (refd)
Pravinchandra Doshi (T/A M/S P Doshi & Co) v Ismail bin Syed Mohamed & Anor [1999] 1 MLJ 35, HC (refd)
Mohana Sundari d/o M Subramaniam; ex p United Prime Corp Bhd, Re [2004] 5 MLJ 227, HC (refd)
Wolverhampton Steel & Iron Co Ltd and others, Re [1977] 3 All ER 467, CA (refd)

Legislation referred to

Insolvency Act 1967 ss 33A, 33A(1), (3), 33B, 33B(1), (2), (2A)(f), (4), (5), 38(1)(a)

Hoo Yee Huan (Shook Lin & Bok) for the plaintiffs.
Franky Irwan Abdul Rashid (Malaysian Department of Insolvency, Federal Territory) for the first respondent.
Muhammad Nasron Rashid (Nik Syahirah Mohd Sani with him) (Basharuddin Iskandar) for the second respondent.

Saheran Suhendran JC:

[1] These grounds of judgment deal with an application under s 33B(4) of the Insolvency Act 1967 ('the IA') to prevent the Director General of Insolvency ('the DGI') discharging the bankruptcy of a judgment debtor under s 33A(1).

INTRODUCTION

[2] Chan Wing is the late father of the second respondent, Dr Mubarak Chan Chin Cheung ('the JD'). The estate of Chan Wing ('estate') is one of the creditors of the JD. The plaintiffs ('JC') are the joint trustees of the estate. On 27 June 2013, the JC submitted a proof of debt in the JD's estate for RM147,461.95 ('POD').

[3] Pursuant to encl 1 (filed by the JC), the learned deputy registrar ('registrar') delivered a decision on 25 July 2024 ('registrar's decision' in encl 20). The registrar's decision prohibited the DGI from issuing a certificate discharging the JD from bankruptcy for a period of two years from 5 July 2024.

[4] On 19 July 2024, the JD appealed (encl 19) the registrar's decision. Clearly, the JD supports the decision of the DGI to discharge, but wanted the condition of the two year suspension lifted.

[5] The DGI did not appeal the registrar's decision.

[6] References to sections of an act are with reference to the IA, save where the context provides otherwise. The cause papers filed herein leading to the appeal before me (encl 19) are as follows:

Document	Encl No
Notice of application dated 26 March 2024 ('NOA')	1
Affidavit in support affirmed by the JC on 19 March 2024 ('AIS')	2
The DGI affidavit in reply affirmed by Zulmazlinawati bt Hussin on 4 April 2024	3
Affidavit in support affirmed by the JC on 16 April 2024	4
Affidavit in reply affirmed by the JD on 2 May 2024	5
Affidavit in reply (2) affirmed by the JC on 9 May 2024	6
The JC's written submissions dated 24 May 2024	7
The JC's bundle of authorities	8
The DGI's written submissions dated 10 June 2024	9
The DGI's bundle of authorities	10
The JD's written submissions dated 11 June 2024	11
The JD's bundle of authorities	12
The JD's written submissions in reply dated 25 June 2024	13
The JC' written submissions in reply (to DGI's written submissions) dated 25 June 2024	14
The JC' written submissions in reply (to JD's written submissions) dated 25 June 2024	15
The JC' bundle of authorities (2) (to DGI's written submissions)	16
The JC' bundle of authorities (3) (to JD's written submissions)	17
The order dated 25 July 2024 reflecting the registrar's decision	20
The notice of appeal by the JD against the registrar's decision dated 18 July 2024	19

BACKGROUND FACTS

[7] The background facts are set out in paras 5–12 of the JC's affidavit (encl 2) in support of the JC's encl 1. Briefly, they are as follows.

[8] The JD was declared bankrupt on an adjudication and receiving order dated 11 February 2011 made by the KL High Court.

[9] Since then, the administration of JD's bankruptcy and the JD's estate was managed by the DGI.

The DGI decides to discharge

[10] In compliance with s 33B, the DGI on 18 May 2023, issued a notice to all creditors including the JC. The notice notified the JC that the DGI intended to issue a certificate of discharge under s 33A, discharging the JD from bankruptcy.

[11] On 21 August 2023, the JC issued a notice of objection contesting the DGI's decision to discharge the JD. By a letter dated 27 February 2024, JC's solicitors were informed by the DGI that its notice of objection was rejected.

[12] On 26 March 2024, the JC then filed (encl 1) under s 33B(4).

[13] After hearing the parties, the deputy registrar made the registrar's decision, allowing encl 1 and ordering that the issuance of any certificate of discharge of the JD's bankruptcy by the DGI be suspended for a period of two years from 5 July 2024.

[14] Hence, the JD filed an appeal ('encl 19'), which came before me.

Locus standi

[15] At the outset I should deal with an issue dealt with by the JD. It was the locus standi of the JD.

[16] I agree that the JD has the locus to bring this appeal. In *Ber: Lim Chai Oi v Ex-Parte: Affin Bank Berhad* [2019] MLJU 1639; [2020] 1 CLJ 518, it was made clear that a judgment debtor is not a 'stranger' to proceedings involving his own bankruptcy, particularly where the judgment creditor seeks to challenge a discharge under s 33A.

[17] I also agree that ss 33B(4) and (5) confirm the JD's right to be notified and to participate in his discharge proceedings. Furthermore, s 38(1)(a) confirms that no sanction of the DGI is required for the JD to take action related to his own bankruptcy proceedings.

[18] These proceedings directly affect the JD's legal and financial interests. I do not believe that the JC can seriously dispute the locus of the JD.

THE LEGISLATIVE STRUCTURE AND POLICY OF THE DISCHARGE PROVISIONS

[19] The procedure for a discharge adopted by the JD was pursuant to ss 33A and 33B.

[20] The purpose of ss 33A and 33B was to provide bankrupts further relief from the stringent effects of bankruptcy. In *Re Mohana Sundari d/o M Subramaniam; ex p United Prime Corp Bhd* [2004] 5 MLJ 227, it was noted:

> 8. A further point which goes to support the argument as aforesaid is the provision of the new s 33A of the Act. This new section allows a bankrupt to apply to the official assignee directly to obtain his discharge after only five years of being a bankrupt. This new section in my view is designed and enacted by Parliament in furtherance of their original intention to afford a bankrupt some relief.

[21] It also appears that there are further proposed amendments to relax the bankruptcy restrictions. But that is for another time.

[22] Sections 33A and 33B are clear and self-evident. They work in this way.

[23] The bankrupt will first make an application directly to the DGI for his discharge. Under s 33A(1), the DGI has the discretion to discharge the bankrupt by issuing a certificate of discharge. However, before issuing the certificate, the DFI must give notice of his intention to issue a certificate under s 33B(1) to all creditors who have filed a proof of debt. Such creditors will have a right to file a notice of objection under s 33B(2) and thereafter, if rejected, to file an application in court under s 33B(4).

[24] Under this ss 33A/33B process, it is important to note that if the court disagrees with the DGI's decision to issue the certificate, the only power that is vested in the court is to make an order that the DGI shall not issue a certificate of discharge for a period not exceeding two years. There is no power for the court to otherwise reverse or modify the DGI's decision, see *Asia Commercial Finance (M) Berhad v Bassanio Teo Yang* [2009] MLJU 313 ('Bassanio Teo').

The three options to discharge

[25] The ss 33A/33B process is just one of the options available for obtaining a discharge. The three options under the IA was explained in *Bassanio Teo*.

[26] The first two were explained thus:

> Under the scheme of the Bankruptcy Act 1976, apart from a scheme of composition, there are *three routes* a bankrupt can avail himself to secure a discharge

from bankruptcy. Under s 105(1) he could apply to annul the bankruptcy on the ground that all the debts had been paid in full or on the ground that the adjudication order should not have been made in the first place. The *second* method is for the bankrupt to approach the court under s 33(1) to seek a discharge from bankruptcy. Under s 33(1), it is mandatory for the court to consider the conduct of the bankrupt during his bankruptcy vide a report from the DGI. The report constitutes prima facie evidence of the statements therein contained by virtue of sub-s 8. The guidelines for discharge are given in the section itself and under case law (see *Re Mohana Sundari d/o M Subramaniam; ex p United Prime Corp Bhd* [2004] 5 MLJ 227; [2004] 1 CLJ 624). Section 33 seems to list out what conduct does not justify a discharge from bankruptcy rather than identify the converse of it. If the bankrupt had committed any of the offences listed under sub-s (4), the court shall not, unless there are special reasons, give him a discharge. In the alternative the court may suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors. In addition if there is proof of the facts listed in sub-s (6), the court shall:

(a) refuse the order; or

(b) suspend the operation of the order for a specified time; or

(c) suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or

(d) grant an order of discharge subject to such conditions as aforesaid.

The facts listed under sub-s (6) are a long list of activities that should not be indulged in by a bankrupt such as trading in the knowledge that he is insolvent, contracting debts that cannot be repaid etc. It also includes a list of circumstances preceding the bankruptcy that shows misconduct on the part of the bankrupt which brought about or caused the bankruptcy such as omitting to maintain account books for purpose of business dealings, extravagance in living, recklessness, gambling, want of reasonable care in business etc. (Emphasis added.)

[27] The third option is under s 33A. The court in *Bassanio Teo* continued:

The bankrupt in the instant case, had taken a *third route* to release himself from the shackles of bankruptcy, ie through s 33A which was inserted in 2003 by Parliament. In *Re Mohana Sundari d/o M Subramaniam ex p United Prime Corp Bhd*, Zulkefli Ahmad Makinudin J (as he then was) quoted with approval the following passage from the judgment of Warren Khoo J in the case of *Re Siah Ooi Choe, exp Hongkong and Shanghai Banking Corp* [1997] 3 SLR(R) 706 which discussed the philosophy behind the law that allowed bankrupts who have not settled their debt to earn a discharge:

> ... the Act was designed to meet *two* major *conflicting concerns. One* stemmed from the fact that *many an individual businessman become insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle. It would be in the interests of society that people who had become bankrupt in such circumstances should be given a second chance in life ... The other concern* was that, without proper safeguards, people who have used dishonest and fraudulent methods in conducting their business affairs to the detriment of

their creditors might get an undeserved advantage from their own wrong doings.

Zulkefli Ahmad Makinudin J then commented that the new of provision of s 33A which conferred the power on the DGI to give discharge to a bankrupt after being one for five years is another provision:

> designed and enacted by Parliament in furtherance of their original intention to afford a bankrupt some relief.

Very interestingly, unlike s 33 under which a bankrupt seeks reprieve from the bankruptcy, s 33A *does not provide any guideline for the DGI* to consider in granting a discharge. The only precondition is that five years must have elapsed since the commencement of the bankruptcy. Learned counsel for the creditor in this case has urged the court to prohibit the DGI from granting a discharge on the grounds that I enumerated earlier. (Emphasis added.)

THE DGI'S DISCRETION

[28] The parties appear to be in agreement as to the principles applicable to the exercise of discretion by the DGI to issue a certificate of discharge under s 33A. The principles are as below.

(a) the exercise of discretion is subject to s 33B and must be made judiciously depending on the circumstances. In *Re Benny Ong Swee Siang, ex parte United Overseas Bank (M) Bhd (formerly known as United Overseas Finance (M) Bhd)* [2016] 8 MLJ 805; [2016] 3 CLJ 1001, it was held at para 19:

> [19] From my reading of ss 33A and 33B of the Bankruptcy Act 1967, the DGI does not have the absolute discretion to issue the certificate of discharge. *The DGI's exercise of the discretion is plainly subjected to the provisions in s 33B. It must be made judiciously depending on the circumstances of each case*. In the Supreme Court case of *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173; [1987] 1 CLJ 368; [1987] CLJ Rep 322, Salleh Abas LP held that *public interest, reason and justice demand that any statutory power must be exercised reasonably and with due consideration.* (Emphasis added.)

(b) a person in whom any power is vested by Parliament (in this case, the DGI) is akin to a trustee and the said person is under an obligation to exercise it reasonably and in accordance with the terms of the relevant statute that confers the power. It is not an uncontrolled discretion. *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 at p 31; [1997] 2 CLJ 248 at p 268, followed the judgment of Raja Azlan Shah Ag CJ (Malaya) (as he then was). Gopal Sri Ram JCA said:

> Raja Azlan Shah Ag CJ (Malaya) explained the principle and its raison d'etre in words that are accorded respect that is usually reserved to statutory formulae found in an Act of Parliament:
>
> > On principle and authority, the discretionary power to impose such

> conditions 'as they think fit' is *not an uncontrolled discretion* to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* have regard to all relevant considerations and disregard all improper consideration, and they must produce a result which does not offend against common sense; or to repeat Lord Denning MR's words in *Pyx Granite Co Ltd v Ministry of Housing and Local Government and Another* [1958] 1 All ER 625, approved in *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503, the conditions to be valid must fairly and reasonably relate to the permitted development. The dictum of Lord Denning MR has been frequently quoted and followed in these matters. ...
>
> Applying the principles stated above, what is the effect of the condition under consideration? I read the affidavit of the Chairman, Land Executive Committee as claiming an *unfettered discretion* to grant or reject any application under s 124 or impose such conditions or other requirements as the committee think fit. *I cannot subscribe to this proposition* for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (ante) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. (Emphasis added.)

[29] Based on the above, it cannot be disputed that the DGI's discretion in issuing a certificate of discharge is not absolute and unfettered. It must be exercised based on valid and legitimate grounds.

[30] The court's power to interfere with the DGA's discretion under s 33A is limited. In *Bassanio Teo*, it was held:

> In my opinion, in reviewing the reasons for discharge under s 33A, the court should, save for exceptional reasons, be slow to substitute its own views as to how that discretion should be exercised as that duty has been entrusted to the DGI by Parliament. The court should be mindful that this is not an application under s 33 where the court has the sole power to determine whether a bankrupt should be discharged. The power granted under s 33B is only the power to delay the discharge of a bankrupt. The representative of the DGI in the instant case has deposed that the respondent has diligently complied with the order to pay RM50 for eight years. He further deposed that the respondent *has no assets* to be realised. *He added that to continue with the administration of the bankruptcy would only burden the respondent as well as the government*. The outstanding amount is still a big sum as the payment

of RM50 a month would never be able to catch up with the accretion of interests on a sum of over RM80,000. Therefore, if the situation were allowed to remain as it were, the bankruptcy would continue indefinitely as feared by the DGI. (Emphasis added.)

[31] His Lordship continued:

In the premises, I am of the view that the power of the court to prohibit the DGI from issuing the certificate to discharge the respondent for a period of two years should only be exercised in *clear cut cases of abuse of s 33A*. Guidance could be sought from s 33(6) but the court should resist the temptation to apply them stringently as that would tantamount to exercising original discretion under s 33(1). Clear cut cases of abuse would be where the bankrupt had obtained huge loans with no intention of paying them back or where the bankrupt is maintaining an extravagant lifestyle beyond his reported income or where he has continued to be reckless in his financial affairs. I note that even if the above facts were proved by the creditor, *the court can only delay the discharge of the bankrupt by two years as Parliament in its wisdom had granted the power to discharge a bankrupt to the DGI*. However, I hasten to add that in this case, from the affidavit of the representative of the DGI, there is no reason to infer that there has been any abuse of s 33A. Therefore there is no reason for me to interfere with the exercise of the statutory discretion which has been vested in the DGI by delaying the discharge of the bankrupt for a period two years. (Emphasis added.)

[32] It is clear that the discretion of the DGI should not be interfered with unless there is an abuse of the discretion.

[33] Further, in the event it is found that the DGI's decision was an abuse or improper, the only remedy under the ss 33A/33B regime is to grant a suspension of the issuance of the certificate of discharge for two years.

DGI — EXERCISE OF DISCRETION AND ABUSE

[34] The registrar's decision in dealing with the appeal in (encl 19) included making the order that the issuance of the certificate of discharge be suspended for two years. Although the DGI did not file a report, the DGI filed an affidavit explaining his decision (encl 3). The DGI only cited two grounds for exercising his discretion to discharge the JD (encl 3, para 21), being that:

(a) the administration of the JD's estate had been continuing for 13 years since 2011; and

(b) the JD is already 90 years old.

[35] The DGI also states (encl 3, para 21) that in deciding whether to grant a discharge of the bankruptcy, the DGI must balance the interests of the JD against the other creditors of the JD's estate.

[36] In short, the JC submitted that a major piece of evidence was not considered by the DGI.

[37] It is this.

The JD's estate must still be administered as there are dividends to be received

[38] The JD has received dividends from the estate since 2016. These dividends were paid by the estate into the JD estate by directly paying such dividends to the DGI. These dividends amount to SGD179,330 (approximately RM627,655), see the JC's affidavit ('encl 2') at paras 15–19. The bankruptcy is therefore not spent as it was in *Bassanio Teo* at para 30 above.

[39] Indeed, the JD stands to receive further dividends from the estate. For 2022, the dividend has been determined to be SGD35,950 (approximately RM125,825). The dividend for 2023 has not as yet been determined by the estate, see paras 16 to 18 of encl 2.

[40] Therefore, a further sum of at least RM125,825 will be paid into the JD estate.

[41] This is not a case where the JD is unable to contribute to the JD estate, as would be the case where there are no assets in estate. In such cases, the bankruptcy would be spent and its maintenance would serve no purpose other than to burden the government. In those circumstances, the DG1 would be justified in discharging a bankrupt.

[42] This was the case in *Bassanio Teo* where the court dismissed an appeal by the judgment creditor against the decision of the registrar refusing to suspend granting the certificate of discharge. The court noted (as emphasised in para 30 above):

> The representative of the DGI in the instant case has deposed that the respondent has diligently complied with the order to pay RM50 for eight years. He further deposed that the respondent has *no assets to be realised*. He added that to continue with the administration of the bankruptcy would only burden the respondent as well as the government. The outstanding amount is still a big sum as the payment of RM50 a month would never be able to catch up with the accretion of interests on a sum of over RM80,000. Therefore, if the situation were allowed to remain as it were, the bankruptcy would continue indefinitely as feared by the DGI (Emphasis added.)

[43] The decision of the DGI to discharge was justified.

[44] In our case the facts are wholly different. The DGI confirms (at encl 3 paras 13 and 19) that creditors are owed at the least, a total of RM16,252,596.95; the balance of the assets in the JD's estate is RM500,409.19. There will be more assets in the form of dividends from the estate that will be received by the DGI which would be administered for the benefit of the creditors. The DGI has more administration to carry out. The bankruptcy is not spent.

[45] The JC stresses that if the appeal is allowed and the suspension is lifted, then the anticipated future dividends from the estate will be paid to the JD directly and he would be free to use those assets as he thinks fit. Based on the JD's averments in encl 5, the JD is desirous to retain the dividends payable by the Estate for his own personal use. This would be at the expense and to the detriment of the creditors.

[46] The JC is correct.

[47] First, after further research, *Jeuro Developments Sdn Bhd v Badan Pengurusan Bersama Kondominium Lagenda, Applicant* [2017] MLJU 2396 establishes the effect of the discharge. At para 33, Vazeer Alam J (as he then was), held, following Jeffrey Tan J (as he then was) in *Pravinchandra Doshi (T/A M/S P Doshi & Co) v Ismail bin Syed Mohamed & Anor* [1999] 1 MLJ 35 at p 42) that:

> [33] I am in complete agreement with the observations of my learned brother Jeffry Tan J (as he then was) as to *the effect of a discharge of bankruptcy*. Once an absolute discharge is given, the property of the discharged bankrupt, except for those caught under ss 35(1)(a) and 35A of the Bankruptcy Act 1967, divests from the director general of insolvency and *the discharged bankrupt is free to deal with these property.* The director general of insolvency has no reason to hold on to the estate of the discharged bankrupt, especially when all of the bankrupt's debts had been settled.

[48] The learned judge held that *Re Wolverhampton Steel & Iron Co Ltd and others* [1977] 3 All ER 467 (CA), which held that the upon a discharge of the bankruptcy without setting aside of the receiving order did not divest the trustee of bankruptcy of the assets of judgment debtor. This means that despite the discharge of the bankruptcy, the assets would remain vested in the DGI. It would follow that there would be no prejudice to the creditors as the DGI would still administer these residual assets for the benefit of the creditors.

[49] However, the court in *Jeuro Developments* held that the legislative provisions in the UK were different. And that in Malaysia, upon an unconditional discharge, the DGI would be divested of the assets of the JD and such assets will then be returned to the control of the JD to do as he pleases.

[50] Secondly, to allow these payments in priority to his creditors (encl 23 para 44) would, in my judgment, be an abuse within *Bossaino Teo* at para 29 above. This is because in an insolvent administration, the estate, whether of an individual or a corporation ought to be fully distributed to the creditors before being returned to the insolvent. This is because given the insolvency of the JD, these assets, in substance, belong 'beneficially' to the creditors. This concept has now been accepted in numerous cases in Company Law.

[51] Thus, it is only proper for the creditors that the discharge of the JD is to be suspended for another two years under s 33B(4) to allow more funds to be paid to the JD estate thus increasing the returns to creditors.

[52] I am acutely aware that the JD is aged and is 90 years. However, there is nothing to show whether the policy and purpose of ss 33A and 33B would be offended if the suspension of the issuance of the certificate of discharge was to be imposed. Indeed, there is little or no evidence to determine whether the JD's debts were just incurred due to misfortune through no fault of the JD, which may trigger the policy behind the protection of these sections, see para 27 above.

[53] Indeed, the admitted debts are large and amount to RM16,252,596.95 whilst the balance left in the JD Estate is merely RM500,409.19. Even the repayment by the JD of RM100 per month was breached ('encl 3') para 20.

[54] The total amount collected from the JD amounts to only RM8,300 as at January 2018 (encl 3, para 20).

[55] In summary, it is more detrimental to the JC and the creditors than to the JD if the JD were unconditionally discharged at this juncture.

[56] I agree that the appeal be dismissed.

[57] One last point taken by the JC. The JC also attacks the conduct of the DGI in not administering the JD Estate properly for the benefit of the creditors.

[58] The DGI had failed to furnish the creditors with any information whatsoever regarding the administration of the JD's estate. The creditors complain that they have no knowledge of the assets of the JD, what was the amount that had been called in, what was the repayment scheme imposed by the DGI. Further, it also appears that no dividends have been paid out.

[59] Effectively, this is a complaint that the administration of the JD's estate was improper. The proper remedy would be for the removal and/or replacement of the DGI, a remedy that is not available under a s 33B(4) application. I will say nothing further on this complaint.

[60] There are two matters that are worth noting.

Exemption under s 33B(2A)

[61] First, is the exemption under sub-s 33B(2A)(f), which came into force on 6 October 2023 after encl 1 was filed on 26 March 2024. It must remain in doubt whether the section actually applies. The section lists specific categories of bankrupts against whom no objections may be made. Sub-section 33B(2A)(f) provides that a bankrupt aged 70 years and above may be exempt from objection if, in the opinion of the DGI, he is incapable of contributing to the administration of his estate.

[62] Even if the section applies, which I seriously doubt (see *Ber Chin Su Hin; ex parte Linggi Agriculture Sdn Bhd* [2023] MLJU 2646 at para 18, per the prolific Arun Noval Dass TP), the affidavit filed on behalf of the DGI ('encl 3') made no statement that the DGI formed the opinion that the JD is incapable of contributing to the JD estate. In any event, it would be difficult to arrive at this conclusion given that the DGI has been receiving dividends from the estate on behalf of the JD, with the JD having a real role to play.

Advertisement

[63] Secondly, it is claimed that the DGI failed to advertise the notice to creditors dated 18 May 2023 (exh 'C3') in a local newspaper in breach of s 33A. This, it is said, constitutes procedural non-compliance and impropriety.

[64] In my judgment, the obligation under s 33A(3) does not arise until the discharge certificate under s 33A(1) is issued. No such certificate has been issued and accordingly, the obligation to advertise has not arisen. No procedural breach has occurred.

CONCLUSION

[65] I note that the court will be slow to interfere with the DGI's discretion unless there is clear evidence of abuse. In this case, to allow the bankrupt to have free use of the assets of the JD estate when there are unpaid creditors is such an abuse.

[66] Accordingly, I dismissed the appeal in encl 19 filed by the JD against the registrar's decision.

Appeal dismissed.

Reported by K Selvaraju